

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the matter of

**Advanced Television Systems**

and Their Impact Upon the  
Existing Television Broadcast Service

**MM Docket No. 87-268**

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**COMMENTS OF  
THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.**

Association of Independent Television Stations, Inc.  
1320 19th Street, N.W.  
Suite 300  
Washington, D.C. 20036  
(202) 887-1970

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The following comments are submitted by the Association of Independent Television Stations, Inc. ("INTV"), in response to the Commission's *Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry* in the above-captioned proceeding.<sup>1</sup> INTV is a non-profit, incorporated association of broadcast television stations unaffiliated with the ABC, CBS, or NBC television networks.<sup>2</sup> These comments are filed to supplement and clarify INTV's position, as otherwise generally reflected and represented in the so-called "Broadcasters' Comments to the Fourth Notice of Proposed Rulemaking."<sup>3</sup> Thus, except as noted herein, INTV's position is represented in the Broadcaster Comments.

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<sup>1</sup>FCC 95-315 (released August 9, 1995)[hereinafter cited as *Notice*].

<sup>2</sup>"Independent" stations as referred to herein include not only truly independent stations, but also local television stations affiliated with the three emerging networks, Fox, UPN, and WB.

<sup>3</sup>Broadcasters' Comments to the Fourth Notice of Proposed Rulemaking, MM Docket No. 87-268 (filed November 14, 1995) [hereinafter cited as "Broadcaster Comments"]. INTV is a signatory to those comments, wherein the positions expressed on each issue represent a consensus, not always a unanimous view."As noted therein, whereas all signatory broadcasters "support the general thrust of" those comments, some might "file individual comments to clarify their positions." Broadcaster Comments at 2.

[REDACTED]

At the outset, INTV respectfully reminds the Commission that it is establishing a regulatory regime for a service which is in the process of progressing from the drawing board to the marketplace. Moreover, as the Commission already has witnessed, keener appreciations of its design, function, and capabilities emerge as it progresses to the marketplace. The moral of the tale, of course, is the danger of writing anything in stone at this time. This is true no less for the Commission than for the parties submitting their views in response to the Commission's *Notice*. Interested parties ought and will do their part to illuminate the issues and establish an up-to-date record for the Commission's consideration. No party, however, has a crystal ball or a time machine, which might give them -- or the Commission -- an accurate and complete vision of the future.

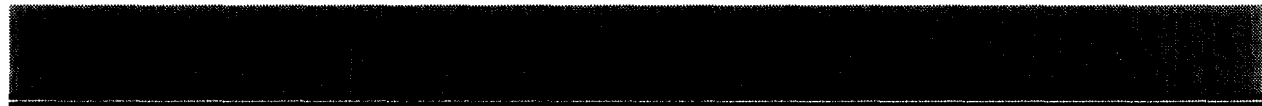
These comments, therefore, represent the best insights and recommendations INTV can provide at this time. As ATV approaches launch and later enters the transition period, more will be learned about its capabilities. More will be learned about the public's response. More will be learned about how broadcast and nonbroadcast ATV services function and fare in a new competitive and regulatory milieu. Flexibility in such circumstances must be embraced as the virtue it is. In that respect, INTV applauds the Commission's issuance of its *Notice* in recognition that the predicates of its previous policy choices had changed.

INTV also wishes to emphasize at the outset that independent stations would welcome a magical transition in which on a given date in the future every television receiver suddenly would be fully ATV-compatible and every broadcast television station were fully ATV-functional. Indeed, if yesterday were that day, that would be just fine. Cursed, however, with a need for a more gradual transition, independent stations must point out that the transition must be managed so as to

[REDACTED]

avoid disenfranchising the public from free broadcast television service or diminishing the return from its "investment" in broadcast spectrum. The public continues to favor broadcast television as the core provider even in today's multi-provider, multi-channel video marketplace. Therefore, viewers deserve every opportunity to transition smoothly and efficiently into the world of ATV without fear that they arbitrarily will be denied access to free broadcast television. Independent stations share that interest. As an advertiser-supported medium, broadcasting depends on access to the audience. This has been recognized by Congress and the Commission in assuring that cable systems may not interdict broadcast signals and deprive stations of their audiences. In short, broadcasters' ability to succeed with ATV services demands continued accessibility of the broadcast audience.

ATV is a promising technology for consumers and broadcasters. Beyond a better quality picture and a possibly expanded array of free broadcast program services, it will open the door to provision of new and innovative communications services by broadcast licensees. INTV, again, applauds the Commission for its enthusiasm and efforts to make broadcast television an even more attractive and beneficial service than it is today.



INTV submits these comments to supplement the views expressed in the Broadcaster Comments. INTV's purpose is to provide emphasis to issues addressed in the Broadcaster Comments or to address issues not expressly covered in the Broadcaster Comments.

First, with respect to eligibility for transitional ATV channels, INTV urges the Commission to presume existing licensees financially qualified to construct ATV facilities, as it does in the case of stations' seeking to modify their facilities. No reason exists to waste Commission and licensee resources in evaluating financial qualifications when the risk of awarding an ATV permit to a




financially unqualified licensee is minimal. INTV also submits that licensees or permittees in bankruptcy should not be considered automatically ineligible. Licensees in reorganization, for example, should not be denied the opportunity to seek the road back to solvency and success. Reasons exist to maintain the eligibility of licensees in liquidation as well. Denied their ATV allotment, bankrupt stations would have little or no chance of returning to the air. This would deprive the public of existing NTSC service and future ATV service. Thus, the Commission should avoid a blanket policy denying ATV eligibility to licensees in bankruptcy.

Second, with respect to service issues, INTV emphasizes its opposition to a minimum HDTV requirement. INTV submits that such a requirement would be superfluous. Stations will provide HDTV regardless. Furthermore, a minimum HDTV requirement could impose unwarranted burdens on stations and skew their programming decisions. INTV is especially concerned because independent stations rely much more substantially on syndicated and local programming, which is less likely to be produced in an HDTV format initially than network programming. Independent stations should not be placed in a position where program format rather than public-oriented considerations dictate programming decisions.

INTV also opposes a simulcasting requirement as superfluous and possibly counterproductive. Simulcasting inevitably will occur. One might only speculate that it will not. Such restrictive rules, however, should await evidence and experience which suggest their need. Forced simulcasting also could hamper and delay development of HDTV service.

INTV emphasizes that free broadcast service must and will remain the core service of broadcast licensees. Whereas stations should retain flexibility in use of their ATV channel, they should be required to maintain a free, broadcast program service on those channels. Flexibility is important, too, because it may permit stations to develop new revenue streams to support their transition to ATV. In this respect, the Commission must remember that new broadcast services on




the ATV channel likely will produce little or no new revenue as the existing audience pie is sliced more thinly.

Finally, INTV has substantial reservations about revenue-based fees, which might be imposed on ATV spectrum used for nonbroadcast services. They may tend to discourage experimentation and innovation by sapping revenues in the critical start-up phase of a new service. Thus, they become a catalyst for failure or a penalty on success. Revenue-based fees also would be difficult to set at levels comparable to one-time auction fees paid by providers of similar services.

Third, with respect to public interest issues, INTV submits that a licensee's public interest obligations ought attach only to free broadcast program services on the ATV channel. No need exists to apply these obligations to nonbroadcast services because free broadcast service will continue to be available on the ATV channel. Furthermore, imposition of public interest obligations on nonbroadcast services would stifle development of such services.

At the same time, INTV submits that stations' compliance with their public interest obligations on their ATV channels should be based on an evaluation of stations' overall programming performance across all free, broadcast services provided on their ATV channels. Application of program-related requirements across all channels would not force sameness across services by requiring that each service provide comparable levels of the same type of programming. This approach will assure that stations fully satisfy their public interest obligations, while permitting them to format their various program services in a way which most satisfies viewer demands, tastes, and preferences.

The Commission also should regulate nonbroadcast services provided via a broadcast licensee's ATV facility in a manner no more onerous than it regulates competitive providers of the same service. Basic notions of competitive fairness -- the "level playing field" in the current





regulatory slang -- dictate a presumption of regulatory parity. Whether new services succeed should remain a matter of marketplace decisions by consumers and viewers undistorted by an inequitable scheme of regulation.

Fourth, with respect to must carry, INTV emphasizes that Congress unambiguously directed the FCC to require cable carriage of ATV signals and particularly urges the Commission to implement these carriage requirements so as to assure that broadcast stations remain grouped together in the channel selection process. If stations or their respective NTSC and ATV channels were scattered throughout a channel or program selection system, then viewer confusion -- already a matter of concern during the transition -- would be compounded. Furthermore, the competitive posture of cable versus broadcast and station versus station would be skewed.

INTV also emphasizes its concern over the potential anti-competitive effects resulting from set-top box architecture and navigational systems. The Commission must insist now through appropriate requirements that selection systems reflect an open and fair access approach to channel accessibility and selection and avoid any bias against broadcast ATV or NTSC channels. Again, this is a potential problem which must be addressed now in a prophylactic manner, rather than awaiting predictable anticompetitive damage to broadcast stations struggling and striving to transition to ATV as quickly and efficiently as possible.

Lastly, INTV urges the Commission to open consideration of the possible need to pre-empt local zoning laws in order to facilitate optimal location of tower sites. The preferable course is to broach the subject now, rather than several years from now when stations find themselves unable to find suitable sites for their ATV facilities.



**A. Licensees of Operating Stations Should Be Presumed Financially Qualified to Construct and Operate ATV Facilities.**

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The Commission for some time has presumed that existing licensees are financially qualified to construct and operate any modified facilities for which they have applied.<sup>4</sup> This policy should apply to licensees and permittees applying for ATV facilities. No reason exists to treat licensees or permittees for ATV facilities differently. Once a licensee has satisfied the eligibility criteria and declared its intention to construct ATV facilities, rarely would any basis exist to question its financial qualifications. Indeed, the Commission has provided an opt-out mechanism for stations which lack the ability (financial or otherwise) to construct ATV facilities. Furthermore, licensees with operating histories rarely face the hurdles to financing their improvements that new entrants face. Thus, the risk of granting an authorization to a financially unqualified licensee is remote. Finally, the construction deadline will sort out the few, if any, licensees which lack resources to construct and operate an ATV facility.<sup>5</sup> The Commission, therefore, would not be courting the flim-flam and scam which pervaded the broadcast comparative hearing process when the Commission permitted a "✓" to justify a finding that an applicant was financially qualified.

In sum, existing licensees eligible for ATV channels should be presumed financially qualified. The risk of delay in provision of service because financially unqualified licensees were

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<sup>4</sup>*Financial Qualifications*, 46 RR 2d 1276 (1980); *see also Indiana University*, 8 FCC Rcd 5555, 5557 (1993).

<sup>5</sup>INTV does endorse the position espoused in the Broadcaster Comments that financially weaker stations be treated differently. However, as is currently the case, when permittees rest on their permits and are clearly and unreasonably deficient in their efforts to construct their facilities, the Commission rightly refuses to extend their permits. *See Broadcast Construction Periods*, 59 RR 2d 595 (1985).

granted ATV authorizations is nil. On the other hand, the waste of licensee and Commission resources flowing from documentation and review of financial qualifications would be real and substantial. INTV, therefore, urges the Commission to presume eligible licensees and permittees financially qualified to build and operate their ATV facilities.

**B. Bankruptcy or Receivership Should Pose No Automatic Bar to Eligibility.**

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INTV subscribes to the positions stated in the Broadcaster Comments, but also wishes to address the issue of licensees or permittees in bankruptcy.<sup>6</sup> INTV submits that a licensee's bankruptcy should not necessarily preclude eligibility. First, licensees which have declared bankruptcy as a means of corporate or personal financial reorganization hardly ought be stripped of their eligibility. Firms and individuals which have sought protection under the bankruptcy laws in the hope of reorganizing their affairs rather than liquidating their assets often work through their financial difficulties and emerge from bankruptcy solvent and successful. Denying them eligibility for an ATV channel would devalue their assets and in all likelihood undermine their efforts to emerge successfully from a reorganization. The value of an NTSC-only facility with a life span coterminous with the transition period would be diminutive in comparison to a station capable of transitioning to ATV. Licensees undergoing temporary financial difficulties prompting reorganization should not be impeded by government fiat from travelling the road back to solvency and success.

Second, even in cases where licensees are facing liquidation of their assets in a bankruptcy proceeding, reasons exist to maintain the licensee's eligibility for the ATV channel. The sale of the facility by the bankruptcy trustee to a new owner will assure a prompt resumption or continuation of service with the debtor's NTSC facilities. However, if that NTSC facility is bereft

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<sup>6</sup>See Notice at ¶32.

of its ATV authorization, its value, again, is diminished severely. This would discourage acquisition of the NTSC-only facility. If no buyer appeared and the value of bankruptcy estate diminished, then the debtor, the creditors, and the public would suffer.<sup>7</sup> In particular, the viewing public would be deprived of service on that channel unless and until a new licensee is selected and builds a new facility from the ground up.

Only where a bankrupt permittee or licensee holds only a naked permit with no broadcast facility or other assets might denial of eligibility make sense. The Commission long has maintained a policy of refusing to approve the sale of naked licenses or permits. In such circumstances, the permit or license has no value and the benefits flowing from a continuation of service via sale of the facility could not be realized. When such licenses or permits are returned or canceled, then, of course, those facilities generally would become open for new entrants.<sup>8</sup>

INTV, therefore, urges the Commission to avoid any blanket rule denying eligibility for ATV channels to permittees or licensees in bankruptcy at the time stations must commit to provision of ATV service.

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<sup>7</sup>See *Second Thursday Corp.*, 22 FCC 2d 515, *recon. granted*, 25 FCC 2d 112 (1970); *see also NewSouth Broadcasting, Inc.*, 10 FCC Rcd 4424 (1995).

<sup>8</sup>In the event spectrum shortfalls exist, INTV submits that such channels first should be used to assure that all operating stations have access to an ATV channel.

**A. While Fully Committed to HDTV Service, Independent Stations Bear a Unique Concern About Minimum HDTV Requirements.**

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INTV's member stations believe that HDTV will be an attractive service to the public and, as such, an integral part of their ATV operations. As is obvious from the Broadcaster Comments, the broadcast industry -- including independent station licensees -- always has seen HDTV as the driver of ATV and has maintained its commitment to implement HDTV. Therefore, a requirement that stations provide HDTV service would be superfluous.

Furthermore, a minimum HDTV requirement could impose unwarranted burdens and skew programming decisions on independent stations. First, independent stations harbor a unique concern about any minimum HDTV requirement, *i.e.*, an adequate supply of HDTV-formatted programming. No independent station enjoys the scope of network service long taken for granted by affiliates of the three established networks (ABC, CBS, and NBC). Independent stations remain predominantly locally-programmed despite the emergence and growth of the Fox Television Network and the more recent emergence of the UPN and WB networks. They rely much more heavily on syndicated and locally-produced programming. Neither of these genres promises to be a particularly broad or deep supply of HDTV programming. Off-network syndicated programs -- a staple of independents -- will have been produced years before entering syndication. Thus, the supply of off-network syndicated HDTV programming will lag the market. Similarly, first-run syndicated HDTV programming (unable to tap the efficiencies of network distribution) likely will trail network programming into the market. Local HDTV programming, which requires the maximum investment in ATV/HDTV facilities for stations, also is likely to be produced widely much less quickly than network programming. Finally, whereas Fox, UPN, and WB will benefit

from their studio libraries (with HDTV compatible motion pictures) and their abilities to tap network efficiencies, they still may be providing less programming to their affiliates than their more entrenched counterparts. A minimum HDTV requirement easily could find independent stations scrambling for HDTV product to meet the minimum regardless of its appeal or attractiveness to their viewers. INTV, therefore, submits that any minimum HDTV requirement likely would have a disproportionately burdensome impact on independents.

Second, a minimum HDTV requirement would elevate program format to a primary consideration. Programming might be selected and scheduled simply because it would enable the station to satisfy a minimum HDTV requirement. Licensees, however, are expected to make programming judgments based on their overall assessment of viewer demand and public interest considerations.

In light of these concerns, INTV also emphasizes that any minimum HDTV requirement -- if and when justified by future circumstances -- should be adopted later in the transition. As the transition continues, more new HDTV programming likely will be coming on the market. As the supply increases, the likelihood that independent stations would be caught short or forced to make format-based programming decisions would diminish.<sup>9</sup> Thus, later imposition of any HDTV requirement would involve less risk of results which were unnecessarily costly and contrary to the public interest.

Thus, whereas INTV subscribes to the arguments expressed in the Broadcaster Comments suggesting no immediate need for a minimum HDTV requirement, it did wish to elaborate on the particular concerns of independent stations and discourage imposition of any such requirement.

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<sup>9</sup>INTV is concerned that a minimum HDTV requirement would create a sellers' market in HDTV programming. Increased program prices are the last thing independent stations would need while they were facing the considerable investment in building out their ATV capabilities.

**B. A Simulcasting Requirement Would Be Unnecessary and Damaging to ATV Development.**

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INTV opposes a simulcasting requirement as unnecessary and possibly counterproductive.<sup>10</sup> First, as suggested by the Broadcaster Comments, simulcasting is virtually inevitable.<sup>11</sup> Therefore, a requirement would be superfluous and unnecessary.

Furthermore, any such requirement would be based on mere speculation. Today's dynamic video marketplace hardly invites sound predictive judgments of service capabilities or public preferences. A simulcasting requirement, which has a direct effect on the content of programming on the ATV channel, must be based on more than a hunch. Therefore, as is the case with many aspects of the ATV implementation, the adoption of restrictive rules should await evidence and experience which would provide a rational and supported basis for their imposition.

Finally, a simulcasting requirement may impose costs in excess of any predicted benefit. For example, limiting broadcasters' use of the ATV channel through imposition of a simulcasting requirement might delay the transition by constraining their use of the channel for HDTV. A station saddled with a simulcasting requirement would have less opportunity to broadcast and promote HDTV programming. The Commission itself has raised this concern previously.<sup>12</sup>

Therefore, adoption of a simulcasting requirement is at best premature and at worst superfluous or counterproductive, and no such requirement ought be imposed on broadcasters.

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<sup>10</sup> As noted in the Broadcaster Comments, individual broadcast interests are submitting their views on a simulcasting requirement. Broadcaster Comments at 22.

<sup>11</sup> Broadcaster Comments at 21-22.

<sup>12</sup> See, e.g., *Third Report and Order*, 7 FCC Rcd 6924, 6972 (1992).

**C. Continued Provision of Free Broadcast Program Service Must Remain a Core Element of Service on the ATV Channel.**

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The continuation of free broadcast television service as the core service transmitted on ATV facilities is a central, but largely assumed theme of the Broadcaster Comments. INTV only wishes to state expressly its view that free broadcast service should remain the heart of a station's ATV service. INTV, therefore, urges the Commission to require that stations provide a free, broadcast program service on their ATV facilities. This is not to deprive stations of the ability to innovate with the new HDTV and multichannel capabilities of the ATV system. Full flexibility would be preserved. A station transmitting several SDTV services on its ATV channel, for example, would be required to program one of those services as a free, broadcast channel. The other channels might or might not be used for free, broadcast programming.<sup>13</sup> However, the core service of free broadcast television would be maintained.

INTV also emphasizes that the flexibility to provide innovative services on the ATV channel in conjunction with the basic free broadcast service is highly pertinent to a smooth and swift transition to ATV. New free broadcast services on the ATV channel are unlikely to increase station revenues. The same audience (and revenue) pie simply will be divided more ways. However, by providing new nonbroadcast services (video, data, or otherwise), stations may tap new revenue sources. This will enhance their ability to fully implement their ATV capability without delay.

INTV does reiterate, though, that free broadcast program service ought and will remain the core service for broadcast television licensees in the transition to ATV.

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<sup>13</sup>In all likelihood, stations would be providing a simulcast of its NTSC channel as well as other free broadcast program services on its ATV channel.

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**D. Revenue Based Fees Pose an Enormous Risk of Stifling Experimentation and Innovation on the ATV Channel.**

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INTV urges the Commission to consider carefully how fees for nonbroadcast spectrum uses are calculated. As the Broadcaster Comments comments posit, burdensome fee calculation mechanisms, fee structures defeating the confidentiality of proprietary financial information, and incentive-robbing fees which skew markets must be avoided. INTV also posits that no less here than in other aspects of this proceeding, the translation of concepts to implementation may be premature. The nature of nonbroadcast services which might trigger imposition of fees is unknown and difficult to predict. A fee structure adopted today based on the soundest of concepts still in application might fit poorly with the types of service subject to the fee. It also raises a considerable risk that an ill-fitting fee structure would stifle new services before they can be tested in the marketplace. Therefore, the Commission must proceed with considerable caution in implementing any fee program applicable to nonbroadcast ATV services.

INTV also harbors serious reservations about a resort to revenue-based fees. They may tend to discourage experimentation and innovation. Many broadcasters will wish to experiment with new and innovative services. Such services typically would be expected to show a profit only after a considerable period of marketing and development, if at all. A revenue-based fee immediately deprives a station of a portion of its revenues. At best, this limits the station's ability to reinvest revenues in such things as service improvements, expansion, and marketing. At worst, it compounds the station's losses and leads to a premature cessation of service. It is, in essence, a penalty on success.

Furthermore, it is difficult to establish a revenue-based fee which is comparable to what competitors in similar services have paid for their spectrum, especially if they obtained their spectrum in an auction. The amount generated by a revenue-based fee would be unpredictable

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because revenues vary. Therefore, establishing a revenue-based fee comparable to a one-time auction payment would be impossible.

Therefore, INTV posits that revenue-based fees would suffer inherent infirmities which render them unworkable and counterproductive to experimentation and innovation.

**A. Public Interest Obligations Ought Apply Only to Free Broadcast Program Services.**

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Free broadcast television service will continue to be the core service on broadcasters' ATV facilities. Their free broadcast service also will continue to be subject to the public interest obligations which now apply to broadcast service on NTSC facilities. As stated in the Broadcaster Comments, no need exists for any change in those obligations as a result of the transition to ATV.<sup>14</sup>

If, however, a broadcaster wishes to experiment with a *non-broadcast* service as one of several SDTV program services transmitted on the ATV channel, no need exists to apply the present public obligations to that service. First, the station's core free broadcast service (as well as its NTSC channel) will remain subject to broadcasters' basic public interest obligations. The public will continue to be able to rely on stations' free video service, which must be responsive to its needs and interests -- and those of its children -- and which must comply with rigid requirements in handling political broadcasts and indecent programming. In short, before, during, and after the

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<sup>14</sup>Broadcaster Comments at 26.

transition, broadcast licensees will continue to provide at least one free, broadcast program service, subject to public interest obligations and requirements.

Second, application of service-molding public interest requirements to new, innovative non-broadcast program services would only stifle the development of such services. Indeed, the Commission has refused to saddle subscription television and direct “broadcast” satellite service with the obligations which now attach to free broadcast television service.<sup>15</sup>

Third, the proverbial *quid pro quo* relationship between free use of spectrum and fulfillment of public interest obligations, therefore, will not exist when broadcasters use ATV capacity to provide nonbroadcast services. Broadcast licensees engaged in nonbroadcast services on their ATV facilities apparently will be paying fees for the spectrum used for such services.<sup>16</sup>

Public interest obligations and requirements, therefore, need not and ought not apply to nonbroadcast services offered by broadcast licensees via their ATV facilities.<sup>17</sup>

**B. Programming on Any Free Broadcast Service on the ATV Channel Should Be Credited Towards Fulfillment of a Licensee’s Public Interest Obligations.**

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INTV agrees with the Broadcaster Comments that programming-related obligations should remain unaffected by the transition and applied to free broadcast service on the ATV channel.<sup>18</sup>

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<sup>15</sup>See *Subscription Video*, 1 FCC Rcd 1001, 1005-06 (1987).

<sup>16</sup>See Broadcaster Comments at 24.

<sup>17</sup>INTV reiterates that such nonbroadcast services would be accompanied by the core free broadcast service or services also offered on the ATV channel.

<sup>18</sup>Broadcaster Comments at 26.

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However, INTV does wish to comment further on application of such obligations when stations provide several SDTV free broadcast program services on their ATV channels.

INTV submits that stations' compliance with their public interest obligations on their ATV channels should be based on an evaluation of stations' overall programming performance across all free, broadcast services provided on their ATV channels. For example, if a station were providing multiple program services including a news and public affairs service or a children's programming service, then it should be considered to have fulfilled its obligation to provide issue-oriented programming or children's programming, even if no issue-oriented or children's programming appeared in the other program services offered by the station.<sup>19</sup> Similarly, the political broadcasting "reasonable access" requirement would be applied across all channels.<sup>20</sup> Whereas a station might be required to provide access to federal candidates on all channels, INTV submits that it should retain the flexibility to make reasonable allocations of time across all channels in fulfillment of its reasonable access obligations. Application of program-related requirements across all channels in the above-described manner would enable stations to receive credit towards fulfillment of their public interest obligations for programming on any and all broadcast services.<sup>21</sup>

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<sup>19</sup>On the other hand, the indecency proscription would apply across all free broadcast services. A station could not defend an indecency complaint by claiming that its other free broadcast services were free of indecent programming.

<sup>20</sup>The equal opportunity provision, of course, would be applied to each individual program service. The concept of equal opportunities would require an equal opportunity to time on the same channel. Otherwise, the opportunity would not be "equal."

<sup>21</sup>Thus, if in the future stations were to be required to provide 3 hours of educational and informational programming for children per week -- a requirement which is resisted mightily by INTV, the Commission would look to the total amount of educational and informational programming for children provided by the licensee on all free broadcast program services. Thus, a station might broadcast all three hours of its educational and informational programming for children on one of several program services or broadcast one hour on each of three program services in order to comply with the three hour requirement.



Furthermore, it would not force sameness across services by requiring that each service provide comparable levels of the same type of programming. This approach will assure that stations fully satisfy their public interest obligations, while permitting them to format their various program services in a way which most satisfies viewer demands, tastes, and preferences.

INTV urges the Commission, therefore, to evaluate stations' compliance with their public interest obligations on their ATV channels based on an evaluation of the stations' overall programming performance across all free, broadcast services provided on their ATV channels.

**C.    Nonbroadcast Services on the ATV Channel Should Be Regulated No More Stringently Than Directly Competitive Services.**

Independent stations look forward to the opportunities offered by ATV technology to expand their services to the public. The multi-channel capability of ATV opens the door to experimentation and innovation in communications services, as well as, perhaps, to more efficient means of offering services already available and familiar to the public. In either case, arbitrary regulatory barriers will be stifling and counterproductive. At the very least, therefore, stations offering such services should be regulated no more stringently than their actual competitors. In the case of entirely new services, regulation should be eschewed absent substantial evidence of real and immediate harm to the public.

Basic notions of competitive fairness -- the "level playing field" in the current regulatory slang -- dictate a presumption of regulatory parity. Otherwise, competition in the true sense of the word would be elusive. True competition in the arena of new and innovative services is especially desirable. Whether new services succeed should remain a matter of marketplace decisions by consumers and viewers undistorted by an inequitable scheme of regulation. Indeed, the concept of regulatory parity goes hand-in-hand with the comparability of regulatory fees.

Therefore, the Commission should regulate nonbroadcast services provided via a broadcast licensee's ATV facility in a manner no more onerous than it regulates competitive providers of the same service.



**A. Must Carry and Retransmission Consent**

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INTV initially emphasizes that Congress has directed the Commission to require carriage of ATV channels. The statute and legislative history are consistent and unambiguous in that regard. The law states:

(B) ADVANCED TELEVISION. - At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission *shall* initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to *ensure cable carriage* of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.<sup>23</sup>

The underlying Conference Report leaves no doubt that mandatory carriage of ATV signals was what Congress intended:

Subsection (b)(4)(B) provides that, when the FCC adopts new standards for broadcast television signals, such as the definition of high definition television (HDTV), it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will *carry* television signals complying with such modified standards in accordance with the objectives of this section.<sup>24</sup>

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<sup>23</sup> 47 U.S.C. §614(b)(4)(B) [emphasis supplied].

<sup>24</sup>H.R. Rep. 102-862, 102d Cong., 2d Sess. 67 (1992) [emphasis supplied]; *see also* IS. Rep. No. 102-92, 102d Cong., 1st Sess. 85 (1991).



Notably, the statute and conference report refer to *advanced television*, not just HDTV.<sup>25</sup> Therefore, the law clearly mandates adoption of rules which require carriage of ATV channels.

INTV also fully endorses the Broadcaster Comments with respect to application of the must carry and retransmission consent requirements during the transition period. INTV particularly urges the Commission to implement these carriage requirements so as to assure that broadcast stations remain grouped together in the channel selection process.<sup>26</sup> In the conventional system of channel selection, for example, stations would occupy contiguous channels in a broadcast station "pod." If stations or their respective NTSC and ATV channels were scattered throughout a channel or program selection system, then viewer confusion -- already a matter of concern during the transition -- would be compounded. Furthermore, the competitive posture of cable versus broadcast and station versus station would be skewed. In a transition environment already characterized by uncertainty and heightened risk, failing to prevent additional confusion and competitive damage would hamper the effort to achieve a swift and smooth transition to ATV. Therefore, INTV emphasizes its support for a requirement that stations be grouped together in the eyes of viewers in the channel selection process.

#### **B. Set-top Box Architecture and Navigational Systems**

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INTV also emphasizes its concern over the potential anti-competitive effects resulting from set-top box architecture and navigational systems. No less than a cable head-end, a set-top converter could become a bottleneck or very biased system of channel selection. Open architecture and bias-free navigational software are essential to the smooth and swift transition desired by

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<sup>25</sup>See also H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 94 (1992).

<sup>26</sup>Broadcaster Comments at 36.



broadcasters, the Commission, and the public. Converters are capable of blocking or limiting channels or according various channels different degrees of viewer accessibility via the navigational system. The history of computer reservation system bias in the airline industry exemplifies this sort of computer programmed bias.<sup>26</sup> The Commission must insist now through appropriate requirements that selection systems reflect an open and fair access approach to channel accessibility and selection and avoid any bias against broadcast ATV or NTSC channels. Again, this is potential problem which must be addressed now in a prophylactic manner, rather than awaiting predictable anticompetitive damage to broadcast stations struggling and striving to transition to ATV as quickly and efficiently as possible. Whereas the particular architecture and software designs which might be employed are still unknown, manufacturers will respond more efficiently and effectively if the Commission emphasizes at the outset that closed or biased set-top box architecture and navigational systems will not be tolerated.

### **C. Pre-emption of Local Zoning Laws**

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INTV also wishes to address several additional issues. First, INTV urges the Commission to open consideration of the possible need to pre-empt local zoning laws in order to facilitate optimal location of tower sites. The ability to locate towers at particular locations may be critical to implementation of the Commission's ultimate allotment scheme. In worst cases, zoning restrictions could preclude a station from securing an ATV transition channel. INTV fully realizes that pre-emption of local zoning ordinances is a difficult and controversial matter. However, this is all the more reason to broach the subject now, rather than several years from now when stations find themselves unable to find suitable sites for their ATV facilities. INTV, therefore, submits that consideration of the need for pre-emption of local zoning laws ought commence immediately.

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<sup>26</sup>See, e.g., *United Airlines v. CAB*, 766 F. 2d 1107 (7th. Cir. 1985).

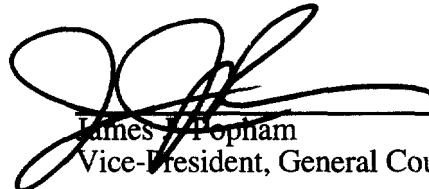


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INTV and its member stations look forward to the new world of advanced television. That world should witness the preservation of the benefits of free broadcast television along with the enhancement of television picture quality and the provision of innovative new services to the public. In effectuating a transition to this world, the Commission never ought neglect this basic goal of making a good thing -- free broadcast television -- even better. This is independent television's commitment. The public deserves no less.

Therefore, INTV urges the Commission to consider and embrace the sound positions enunciated in the Broadcaster Comments and amplified herein.

Respectfully submitted,

  
James J. Popham  
Vice-President, General Counsel

**Association of Independent  
Television Stations, Inc.**  
1320 19th Street, N.W.  
Suite 300  
Washington, D.C. 20036  
(202) 887-1970

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